Supreme Court, U.S.
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No. 95-1143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PUBLIC UTILITY COMMISSION OF OREGON,

Petitioner,

v.

GTE NORTHWEST INCORPORATED,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Oregon

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 18, 1996

45 pp

QUESTION PRESENTED

Whether the Oregon Supreme Court correctly held that, under Oregon law, the Public Utilities Commission of Oregon lacks the authority to require a company to allow a third party to occupy a portion of the company's property because the Public Utilities Commission of Oregon lacks the power of eminent domain.

RULE 29.6 STATEMENT

Respondent GTE Northwest Incorporated is a wholly-owned subsidiary of GTE Corporation. The following subsidiaries of GTE Corporation have securities in the hands of the public:

BC TELECOM, Inc.
Caribbean Reservation Center, C. por A.
Communicaciones Telefonicas, C. por A.
Contel of California, Inc.
CTI Compania de Telefonos del Interior S.A.
CTI Norte Compania de Telefonos del Interior S.A.
Florence Cellular Telephone Company, Inc.
GTE California Incorporated
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE Leasing Corporation
GTE Midwest Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE South Incorporated
GTE Southwest Incorporated
GTE Yellow Pages Hungary Kft
Jacksonville Cellular Telephone Corp.
Jacksonville Cellular Communications, Inc.
La Compagnie de Telephone Anglo-Canadienne/
Anglo-Canadian Telephone Company
MTX Italia
Parque Industrial ITABO, S.A.
Quebec Telephone
Radiowealth, Inc.
The Micronesian Telecommunications Corporation
Wilmington Cellular Telephone Corp.
Wilmington Cellular Communications, Inc.
Zona France Las Americas

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GTE NORTHWEST INCORPORATED,
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On Petition for Writ of Certiorari to the Supreme Court of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent GTE Northwest Incorporated ("GTE Northwest") opposes the Public Utility Commission of Oregon's ("PUCO") Petition for a Writ of Certiorari to review the decision of the Supreme Court of Oregon.[1]

JURISDICTION

Petitioner invokes 28 U.S.C. § 1257(a) as the basis for this Court's jurisdiction to review the decision of the Oregon

[1]The petition for writ of certiorari in this case was filed on January 11, 1996. On February 1, 1996, the Court granted respondent an extension of time to March 18, 1996 to file this response.

Supreme Court. As explained below, there is a substantial issue as to whether jurisdiction is available under § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

A. Constitutional Provisions

Petitioner asserts that this case involves the Fifth Amendment to the United States Constitution. The decision below, however, rests on an interpretation of Article I, section 18 of the Oregon Constitution, which provides in relevant part:

> Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation
>
> . . . .

B. Statutes and Regulations

In addition to the statutes and regulations identified in the petition, the following are also relevant:

Public Utility Commission of Oregon Order No. 96-021 (Jan. 12, 1996) ("Local Competition Order"), excerpts of which are set forth in Appendix A. That order authorizes certain companies to provide local exchange telecommunications services in competition with GTE Northwest in certain of its service areas in the State of Oregon.

Section 251(b)(6) of the Telecommunications Act of 1996, which in pertinent part imposes on incumbent local exchange carriers:

> [t]he duty to provide on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier

demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

COUNTERSTATEMENT OF THE CASE

1. Before addressing the operation of the PUCO rules at issue in this case, it is necessary briefly to correct certain "factual" misstatements in the petition.

GTE Northwest is a local exchange company ("LEC"), which is a company that provides local telecommunications services within a given geographic area. GTE Northwest owns and operates the telecommunications network by which it provides telecommunications services. That network consists principally of (i) outside plant -- cables, wires, poles, conduits, and the like, (ii) complex switching equipment, and (iii) building premises in which equipment and personnel operate.

Contrary to the gist of the petition, there is no evidence in the record in this case suggesting that GTE Northwest does not own (or, in some cases, lease) this network equipment and premises or that such property is not the exclusive private property of GTE Northwest. Nor is there anything in the Oregon Supreme Court's decision indicating in any way that this network property -- particularly the premises on which PUCO attempted to authorize physical occupation by third parties -- is not fully GTE Northwest's private property. To the contrary, the PUCO rules at issue specifically recognize that the "premises" on which third party physical occupation is required are "*owned by the LEC.*" OAR 860-35-020(8), (27). Moreover, although evidence was not taken on this issue in the proceedings below, GTE Northwest has all of the traditional incidents of ownership in its network property, including title, possession, and the right to incur debt to finance that property and to depreciate it, and the obligation to pay taxes on it.

It is certainly true that GTE Northwest's provision of local telecommunications services is regulated by the State of

Oregon. But the factual premise on which much of petitioner's argument is based -- that "in exchange for a monopolistic franchise, the government exacts from [GTE Northwest] the exclusive right to direct and control the use and possession of their utility property" (Pet. 14) -- has no basis in the record. There was no evidence presented in this case that GTE Northwest ever agreed to turn over ownership of its private network property, including its building premises, in exchange for an exclusive franchise. The quid for the quo of the exclusive franchise was GTE Northwest's agreement to provide quality universal telephone *service* to Oregon customers, not an agreement to relinquish its bundle of private property rights. Moreover, GTE Northwest no longer even enjoys an exclusive franchise in Oregon.[2] It is thus more than a bit disingenuous for PUCO to assert, as if it were fact, that GTE Northwest has turned over (either partially or completely) ownership of its network private property to the State of Oregon in exchange for an exclusive franchise.

In any event, *nowhere* in its decision has the Oregon Supreme Court concluded that, as a matter of state law, GTE Northwest had any prior agreement or understanding with the State that its private property would become "public," or "quasi-public," or anything less than fully GTE Northwest's own private property, in exchange for an exclusive franchise.

2. With that "factual" haze cleared, it is possible to focus on the real issue in this case -- the authority of the Oregon PUC to issue the collocation rules contained in OAR 860-35-020(8), OAR 860-35-070(5), and OAR 860-35-110 (the "Collocation Rules").

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[2] Attached as Appendix A are relevant excerpts of an Order of PUCO, issued five days before the Petition for a Writ of Certiorari was filed in this case, authorizing certain local telecommunications companies to provide such services in competition with GTE Northwest in its service areas. *See* Local Competition Order.

Local telecommunications providers offer at least two types of services, referred to as "basic" and "enhanced" services. "'Basic services' are those services that 'provide[] transmission capacity for the movement of information'; they include 'data processing, computer memory or storage, switching techniques and other activities which facilitate the movement of information.'" Pet. App. 2-3 (quoting OAR 860-35-020(4)). "'Enhanced services' are those services that 'employ[] computer processing applications that act on the format, content, code, protocol or similar aspects of the customer's transmitted information,' provide customers with 'additional, different, or restructured information,' or 'involve customer interaction with stored information.'" *Id.* at 3 (quoting OAR 860-35-020(13)). Examples of "[e]nhanced services include 'voice messaging' and 'protocol translation between customer equipment or software.'" *Id.*

The Collocation Rules *require* a LEC to allow a provider of enhanced services (an "enhanced service provider," or "ESP"), or another competitor either to "collocate" or "virtually collocate" on LEC premises, the choice belonging to the ESP or other competitor. "Collocation" means "plac[ing] and install[ing] . . . a[n] [ESP's] equipment, software, and databases on LEC premises[,]" including "central offices, remote network facilities, or any other similar location owned by the LEC." OAR 860-35-020(8). In other words, "[i]f an ESP chooses to collocate, an LEC *must* allow the ESP to occupy a portion of the LEC's property for the ESP's equipment." Pet. App. 4 (emphasis added).

Virtual collocation is somewhat different. "If an ESP chooses to virtually collocate, an LEC must obtain and place equipment on the LEC's property for that particular ESP's needs. OAR 860-35-110(5), (6). Virtual collocation differs from collocation in that, when virtual collocation occurs, the LEC owns the equipment being used by the ESP; by contrast, when collocation occurs, the ESP owns the equipment that is placed on the LEC's property." Pet. App. 4. The Collocation

Rules provide that the LEC is to be reimbursed for either collocation or virtual collocation by the ESP.

3. In the courts below, GTE Northwest challenged only PUCO's authority to mandate collocation. GTE Northwest did not challenge PUCO's authority to order virtual collocation, the option under which *the LEC* owns the property being used to support the ESP's needs. Moreover, with respect to collocation, GTE Northwest argued that PUCO lacked the authority, *under state law*, to order collocation because PUCO lacked the power of eminent domain. As part of that state law argument about PUCO's authority, GTE Northwest argued that PUCO's collocation rule constituted an exercise of the power of eminent domain (a taking of private property) within the meaning of both Article I, section 18 of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution. GTE Northwest's challenge did not put at issue the adequacy of any compensation that might be paid to it by a collocator because that issue, while it would have been relevant and necessary to a direct Takings Clause challenge to the Collocation Rules, was not relevant to GTE Northwest's state law argument that PUCO lacked the power of eminent domain.

4. The Court of Appeals rejected GTE Northwest's challenge, concluding that the Collocation Rules did not amount to an exercise of the power to take property because: (i) collocation is not a "permanent" physical occupation; and (ii) the LEC, being "regulated heavily," lacks the power to exclude third parties from occupying their premises. *See* Pet. App. 5, 37.

5. The Oregon Supreme Court reversed. The Oregon Supreme Court first "turn[ed] to whether the PUC has the authority to promulgate rules that affect a taking *within the meaning of the Oregon Constitution*." Pet. App. 8 (emphasis added). The court concluded that, under Oregon state law, PUCO did not have the power of eminent domain because "the power of eminent domain may be exercised by an agency *only*

if the agency has express statutory authority[,]" and "[t]he PUC does *not* have express statutory authority to promulgate rules that would effect a taking of an LEC's facilities." Pet. App. 11. (emphasis added).

Having decided that PUCO did not have the power of eminent domain under state law, the Oregon Supreme Court went on to consider whether the actual (as opposed to virtual) collocation mandated by the Collocation Rules effected a taking. The court found that, under the reasoning of cases such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and its progeny,[3] PUCO's collocation requirement did indeed effect a taking. The Court concluded that, under the reasoning of *Loretto*, when the government requires a "'physical intrusion [into one's property that] reaches the extreme form of a permanent physical occupation, a taking has occurred,'" Pet. App. 12 (quoting *Loretto*, 458 U.S. at 426), "regardless of 'whether the [physical occupation] achieves an important public benefit or has only minimal economic impact on the owner,'" *Id.* (quoting *Loretto*, 458 U.S. at 434-35). The Oregon Supreme Court specifically acknowledged that under cases following *Loretto* -- particularly *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), and *Yee v. City of Escondido*, 503 U.S. 519 (1992) -- this Court had specifically limited the holding of *Loretto* by clarifying that "[t]he government effects a physical taking only where it *requires* the [property] owner to submit to the physical occupation of his [property]," but not where the government merely regulates the terms of a physical occupation to which the property owner voluntarily agreed. Pet. App. 15 (quoting *Yee*, 503 U.S. at 527).

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[3] Having earlier stated in its opinion that it was deciding whether "the PUC has the authority to promulgate rules that affect a taking *within the meaning of the Oregon Constitution*[,]" Pet. App. 8 (emphasis added), the Court explained that it would look to federal cases such as *Loretto* because "GTE [had] offer[ed] no separate analysis under the state constitution", but that the Court would "assume . . . that the analysis is the same under Article I, section 18, of the Oregon Constitution . . . ." Pet. App. 11, n.6.

Under these well-settled principles, the Oregon Supreme Court concluded that PUCO's (actual) Collocation Rules amounted to a taking for three reasons. First, the Court noted that collocation, by definition, involved the "placement" and "installation" of an ESP's equipment on LEC property and the "direct physical attachment" of such equipment to LEC property, and therefore constituted a physical occupation. Pet. App. 16. Second, the Court noted that, as in *Loretto*, it is the third party intruder (the ESP), not the LEC, that owns the equipment that is physically occupying and directly attaching to LEC property. *Id.* at 17. Third, the Court noted that, as in *Loretto*, but unlike in *Florida Power* and *Yee*, the collocation rules "*require* an LEC to provide collocation," and do not merely regulate the terms of an invitation to occupy that was voluntarily offered by the LEC to the ESPs. *Id.* For these reasons, the Oregon Supreme Court found that PUCO's (actual) Collocation Rules fit easily within the understanding of what constitutes a taking by permanent physical occupation. *See* Pet. App. 16-18.

The Oregon Supreme Court then went on to reject two arguments made by PUCO. First, the Court rejected the notion that the mere fact that, under Oregon law, PUCO may enter the premises of a LEC to conduct inspections and there are restrictions on a LEC's disposal of its network assets used to serve telephone customers, meant that the LEC lacked a property right in the premises and property that were physically invaded by ESP collocation. Pet. App. 18. Second, the Court rejected PUCO's alternative argument that the mere fact that it (purportedly) could prevent a LEC from placing its own enhanced services equipment in its basic service plants meant that requiring the LEC to suffer a physical invasion of equipment owned by the ESPs did not constitute a taking. Pet. App. 20-22.

Accordingly, the Oregon Supreme Court concluded that the (actual) Collocation Rules "*would* effect a taking" and

therefore "the PUC [had] exceeded its statutory authority when it promulgated those rules." Pet. App. 22 (emphasis added).

REASONS FOR DENYING THE WRIT

As elaborated below, the reasons the Court should not grant the Petition are manifest and numerous:

First, it is not clear the Court has jurisdiction to review this case, as the decision below does not find any state law "repugnant to the Constitution" and does not appear to have passed on any "title, right, privilege, or immunity" specially set up under the U.S. Constitution. *See* Part I, *infra*.

Second, there is absolutely no conflict among the federal courts of appeals or the state courts of last resort on the issue of whether collocation constitutes a taking. To the contrary, the one federal court of appeals to address the issue has reached essentially the same result as the Oregon Supreme Court. The only lower federal court case(s) that petitioner even contends are inconsistent with the decision below (involving the appointing of federal receivers to run failing savings and loans institutions) are quite plainly distinguishable. *See* Part II, *infra*.

Third, the decision below is a correct application of settled takings principles that this Court has already explored and explicated in prior cases. Moreover, the issues that petitioner contends are presented by this case (such as whether GTE Northwest has ceded part of its property rights in its network equipment to the State in exchange for an exclusive monopoly franchise) are based on factual assertions by petitioner that are wrong (or at least in genuine dispute) and that were not passed on by the courts below. *See* Part III, *infra*.

Fourth, the facts of this case are unique, not recurring, and the decision of course applies only in the State of Oregon. Even if other States were to follow the decision of the Oregon Supreme Court, nothing in the decision below disables any State (including Oregon) from authorizing its public utility

authority to exercise the power of eminent domain. The decision below in no way even addresses whether, if PUCO had the power of eminent domain, the compensation paid by the collocators to GTE Northwest would be adequate to avoid any constitutional problem. *See* Part IV, *infra*.

Finally, the new Telecommunications Act of 1996 renders the decision below either moot or of no practical significance. *See* Part V, *infra*. Even if the Court thinks that the question whether actual collocation effects a taking of private property is a certworthy question on which review should be granted someday, it is far preferable for the Court to wait until the federal courts have had the opportunity to consider takings challenges, if any, to the collocation requirements of the new Act.

I. IT IS NOT CLEAR THAT THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(a) TO REVIEW THE DECISION BELOW.

It is not clear that the Court has jurisdiction to review the decision below under 28 U.S.C. § 1257(a). The "takings" issue raised by the petition is doubly embedded in state law issues.

The first level of embedding stems from the fact that the Oregon Supreme Court did not decide that the Collocation Rules violated either the Oregon or U.S. Constitutions. Rather, the Court merely held that PUCO did not have the statutory authority, ***under state law***, to order collocation because collocation amounted to an exercise of the power to take private property. It is far from clear that this Court has jurisdiction to review such a decision.

As revised in 1988, section 1257(a) authorizes this Court to review judgments of the "highest court of a State" in three instances: (i) "where the validity of a treaty or statute of the United States is drawn in question[;]" or (ii) "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or

laws of the United States[;]" or (iii) "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

The first alternative -- relating to the validity of a treaty or statute of the United States -- is obviously not applicable here. With respect to the second alternative, it cannot be said that the judgment below draws into question the validity of a state statute (which includes an administrative regulation) "*on the ground of being repugnant to the Constitution . . . of the United States*." 28 U.S.C. § 1257(a) (emphasis added). The Oregon Supreme Court did not decide that PUCO's Collocation Rules were "repugnant" to the U.S. Constitution. Rather, the court decided, as GTE Northwest had argued, that PUCO lacked the power, as a matter of state law, to effect a taking. That the court may have looked to the U.S. Constitution to determine what constitutes a "taking" is not the same as ruling that the Collocation Rules are repugnant to the U.S. Constitution. The Oregon Supreme Court could not have made a determination of repugnancy to the U.S. Constitution without also finding that PUCO did not provide GTE Northwest with adequate compensation (as the U.S. Constitution does not prohibit the taking of private property in all instances, but rather only the taking of private property without just compensation, U.S. Const., Amendment V), an issue the court never passed on.

For similar reasons, it cannot comfortably be said that the third alternative in section 1257(a) is satisfied here -- that "any title, right, privilege, or immunity [was] specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. § 1257(a). The relevant right under the U.S. Constitution is the right not to have a State take private property for a public use *without just compensation*. It was unnecessary for GTE Northwest to claim or set up that right in the proceedings below because it was enough to

demonstrate that PUCO exceeded its statutory authority merely by effecting a taking.

At a minimum, therefore, there is a substantial threshold issue as to whether the Court has jurisdiction to review the judgment below under 28 U.S.C. § 1257(a). There is a significant likelihood that briefing and oral argument will become sidetracked on this problematic jurisdictional question and a very real risk that the petition might be dismissed as improvidently granted. Accordingly, there are strong prudential grounds for denying certiorari.

Moreover, the takings issue is embedded in state law at a second level. It is clear from the face of the Oregon Supreme Court's decision that its determination of what constitutes a taking rested ultimately on the Oregon Constitution. The court decided "whether the PUC has the authority to promulgate rules that affect a taking *within the meaning of the Oregon Constitution*." Pet. App. 8 (emphasis added). The Oregon Supreme Court did, of course, look to cases such as *Loretto*, *Florida Power*, and *Yee*, which interpret the U.S. Constitution, but the Oregon Supreme Court explained that it was doing so because GTE Northwest had not separately relied on cases construing the Oregon Constitution, and the Court assumed "that the analysis is the same under Article I, section 18, of the Oregon Constitution, and the Takings Clause of the Fifth Amendment of the Constitution of the United States." Pet. App. 11, n.6. Whether or not the Oregon Supreme Court's statement that it was resting its takings analysis on the Oregon Constitution is enough to erect an "adequate and independent state grounds" bar to this Court's jurisdiction, *see Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983), this second level at which the takings issue is embedded in state law is further reason, as a matter of prudence, not to grant the petition.

II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS OF APPEALS OR THE HIGHEST STATE COURTS ON WHETHER COLLOCATION CONSTITUTES A TAKING.

Petitioner does not contend that the decision below conflicts with that of any other state court or lower federal court on the specific federal issue that petitioner contends is presented -- whether a rule requiring a utility to collocate on its property the equipment of a third party constitutes a taking by permanent physical occupation. To the contrary, petitioner admits that the Oregon Supreme Court "does not stand completely alone" because the United States Court of Appeals for the D.C. Circuit "has taken the same approach in analyzing the federal 'collocation' requirement." Pet. 21. Indeed, as petitioner concedes, the one federal court to address the issue agrees that physical (*i.e.*, actual, as opposed to virtual) collocation "would seem necessarily to 'take' property regardless of the public interests served in a particular case." *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994).[4]

The only "conflict" among the state and lower federal courts that petitioner offers is one that petitioner itself describes as merely a conflict "in fundamental principle . . . in a closely analogous setting." Pet. 21. Those are guarded words, and rightfully so. Petitioner contends that the decision below conflicts with decisions of the United States Court of Appeals for the Federal Circuit (of which *California Hous. Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992), is representative) rejecting physical occupation takings challenges to the appointment of a Resolution Trust

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[4] In *Bell Atlantic*, the D.C. Circuit interpreted the FCC's then-existing statutory powers not to include the power to order physical collocation because physical collocation would seem necessarily to constitute a taking under the reasoning of *Loretto*, and, where possible, the FCC's statutory powers should not be read to "create[] a broad class of takings claims." 24 F.3d at 1445.

Corporation conservator and receiver for a failing savings and loan association. These cases obviously do not involve the same federal issue that petitioner raises here -- whether mandatory physical collocation constitutes a taking -- and therefore could not possibly establish the type of *direct* conflict that, even if it were more widespread, would justify this Court's review. *See* Robert L. Stern et al, *Supreme Court Practice* (1993) at 167 ("there must be a real or 'intolerable' conflict . . . not merely an inconsistency in dicta or in general principles utilized").

But, in any event, *California Housing Securities* is not even inconsistent with either the decision below or with *Bell Atlantic*. In *California Housing Securities*, in order to obtain federal deposit insurance, the savings and loan association "pledged that it would 'not carry on any sales plan or practices . . . in violation of [FSLIC] regulations," 959 F.2d at 956, and agreed that "the Federal Home Loan Bank Board could appoint FSLIC as conservator or receiver of a federally-insured savings and loan association," *id.*, to prevent continued mismanagement. Thus, the alleged taking was in fact nothing more than the federal receivership that the savings and loan association had agreed to in order to obtain federal deposit insurance, which is no taking at all. Here, GTE Northwest never agreed to allow third parties to occupy physically its premises for any reason.

Second, there is a vast difference between the *government* entering onto one's property or seizing one's assets to enforce the law, and the government authorizing a *third party* physically to occupy a portion of one's property. Indeed, in *Loretto*, the Court emphasized the unique and severe intrusion that occurs when the government authorizes a *third party* to occupy a person's property: "[A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . . To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury." 458 U.S. at 436.

In short, a case such as *California Housing Securities* about the right of a federal government entity to seize control of assets has nothing to do with whether a State's authorization of a permanent physical occupation by a third party constitutes a taking. And, at the very least, such a case does not create the sort of *direct* conflict that, were it more widespread, would justify the issuance of the writ of certiorari.

III. THE DECISION BELOW CORRECTLY APPLIES WELL-SETTLED PRECEDENTS OF THIS COURT.

The issue of what constitutes a taking by permanent physical invasion has been fully and clearly explicated by this Court, in cases such as *Loretto, supra, Florida Power, supra,* and *Yee, supra,* and there is no reason to grant review in another case to apply those well-settled principles to a new set of facts. For that reason, the petition is a classic example of the sort that this Court routinely denies.

In *Loretto*, this Court held that a New York law requiring a landlord to permit installation of cable television equipment on rental property constituted a constitutionally compensable taking. The Court held that, while "no 'set formula' exist[s] to determine, in all cases, whether [government regulation of private property constitutes a taking]," where the government authorizes a *permanent physical occupation* of one's property by a third party, a taking is "determinative[ly]" established. 458 U.S. at 426. The Court found that the law at issue in *Loretto* plainly constituted a taking by physical occupation because the "installation involved a direct physical attachment of" the cable company's equipment to the owner's property. *Id.* at 438.

In holding that the New York law effected a taking, the Court specifically rejected three arguments advanced by the cable company that mirror those recycled -- in one form or another -- in the current petition:

First, the cable company argued that "the law [was] simply a permissible regulation of the use of real property," *id.*

at 439, which was justified as part of the State's longstanding and "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular," *id.* at 440. The Court rejected this argument, observing that the mere fact that the personal property at issue was part of the highly regulated rental housing industry was irrelevant. *See id.* at 439-440, or, as the Court put it: "We fail to see . . . why a physical occupation of one type of property [that subject to heavy landlord-tenant regulation] but not another type is any less a physical occupation" and therefore a taking. *Id.* at 439.

Second, the Court rejected the cable company's circular argument that, in light of its extensive regulation of the rental housing industry, the State had "granted a tenant the property right to have a CATV installation" -- *i.e.*, that that stick in the bundle of property rights belonged to the tenant and not the landlord, and therefore was not taken from the landlord. *Id.* at 439. The Court roundly dismissed that argument noting both that "the government does not have unlimited power to redefine property rights[,]" and that "a State, by ipse dixit, may not transform private property into public property without compensation." *Id.* (internal quotations omitted).

Third, the Court rejected what it called the cable company's argument that there was no taking because "the landlord could avoid the requirements of [the New York law] by ceasing to rent the building to tenants." *Id.* at 439 n.17. The Court observed that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.*

Five years later, this Court revisited the application of principles of takings by permanent physical occupation to highly regulated industries in *Florida Power Corp.*, *supra*. In that case, a utility company challenged on takings grounds the provisions of the Pole Attachments Act that authorized the FCC to set the rates that utility companies could charge cable television companies for using their utility poles for stringing television cable. The Court held that "*Loretto* ha[d] no

application to the facts of [*Florida Power*]" -- and there was no taking by physical occupation -- because while "the statute we considered in *Loretto* specifically *required* landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act as interpreted by the FCC . . . gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators." 480 U.S. at 250-251 (emphasis added).

In other words, where, as in *Florida Power*, the property owner voluntarily *invites* the third party onto its property (by lease or otherwise), there is no permanent physical occupation mandated by the government and hence no taking for that reason, and the government is free to regulate the terms of the lease or other invitation (*i.e.*, regulate the *use* of the property) without effecting a *per se* taking by physical occupation. Or, as this Court put it, "th[e] element of *required acquiescence* is at the heart of the concept of [*per se* taking by physical] occupation." *Id.* at 252 (emphasis added).[5]

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[5] In a footnote in *Florida Power*, the Court stated that "[w]e do not decide today what the application of [*Loretto*] would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." 480 U.S. 252 n.6. Petitioner characterizes this routine exercise of judicial restraint as the Court's specifically reserving the issue whether "*Loretto* applies to public utilities." Pet. 15. The Court said no such thing. The Court was simply responding to the utility's suggestion that the FCC had in fact interpreted the Pole Attachments Act to *require* utilities to allow cable companies to occupy their pole space, and therefore the element of "required acquiescence" was met. *See* 480 U.S. 252 n.6. Viewed in that context, the Court's statement should be understood to say that the Court was not deciding whether *Loretto* would invalidate the FCC's *statutory interpretation* of the Pole Attachments Act on the ground that a statute should be read to avoid a constitutional infirmity. The Court surely did not expressly reserve the application of *Loretto*'s takings principles to utilities. Indeed, as discussed above, the Court had already rejected the suggestion, in *Loretto* itself, that the highly regulated nature of the property at issue altered the application of physical occupation takings principles. *See Loretto*, 458 U.S. at 439-40.

Again, in *Yee*, *supra*, this Court revisited the issue of takings by permanent physical occupation and reaffirmed the straightforward principle that "[the] element of required acquiescence is at the heart of the concept of [taking by physical] occupation." 503 U.S. at 527. In *Yee*, a mobile home park owner challenged a local rent control ordinance that, when viewed against the backdrop of state law, limited the bases upon which mobile home park owners could terminate the leases of mobile home owner tenants. The Court held that the reasoning of *Loretto* did not apply -- *i.e.*, there was no *per se* taking by physical occupation -- because "[p]etitioners voluntarily rented their land to mobile home owners[,] and that "[a]t least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so." 503 U.S. at 527-528. Or as the Court "[p]ut [it] bluntly, no government has required any physical invasion of petitioners' property [because] [p]etitioners' tenants were invited by petitioners, not forced upon them by the government." *Id.* at 528.

Applying these well-settled principles to this case, the Oregon Supreme Court's decision is perfectly correct. First, there is no question that actual collocation involves an "installment" and "direct physical attachment" on LEC property. *Loretto*, 458 U.S. at 438. Second, there is no question, under the actual (as opposed to virtual) collocation rules, the third party, not the LEC, owns the property that is occupying LEC premises. *See Loretto*, 458 U.S. at 440 n.19. Third, there is no question but that, unlike in *Florida Power* and *Yee*, the Collocation Rules *require* a LEC to allow the third parties physically to occupy their premises. Thus, this case falls squarely within the *per se* takings rule of *Loretto*, as clarified in *Florida Power* and *Yee*, and the decision below is perfectly correct.

In a desperate attempt to transmogrify this case into something more than a rather dull, straightforward, and assuredly uncertworthy, application of the well-settled

principles of *Loretto*, *Florida Power*, and *Yee* to the particular facts of this case, petitioner raises three related arguments that are either flatly wrong, or not presented by this case, or both.

First, petitioner contends that there is no taking here because GTE Northwest does not have any property right to be taken. In this regard, petitioner argued below that the fact that "LECs lack the power to exclude the PUC from their property" (to the extent that PUCO is authorized under state law to conduct inspections of LEC property) and the fact that "public utilities are restrained in how they make use of their property" mean that GTE Northwest never had the right (as part of the bundle of private property rights) to exclude ESPs in the first place, and therefore the Collocation Rules take nothing from GTE Northwest. *See* Pet. App. 18.

This argument is irrelevant, and was rejected in *Loretto*. It is irrelevant to the takings analysis that PUCO can, under certain circumstances, enter LEC premises to conduct inspections or examinations. The fact that the Government may enter one's premises, under certain circumstances, to ensure compliance with the law most assuredly does not mean that one does not maintain full private property rights in one's premises, including the cherished rights to exclude third parties or to receive just compensation for a government-mandated invasion by others. *See Loretto*, 458 U.S. at 436. If that were the law in our heavily regulated modern administrative state, almost no person or entity would have the right to exclude third parties or be entitled to just compensation for a physical taking because some government agency is almost always able to enter business premises to enforce some regulatory law or another. In short, the right of the government to enter one's premises to ensure compliance with the law does *not* deprive one of the essential property right of excluding others. Moreover, as the Oregon Supreme Court noted, this Court rejected the argument in *Loretto* that the historically broad regulatory power of the State over an industry (there, the rental housing industry) somehow diminished a government-

mandated physical invasion by a third party into something less than a *per se* taking. *See Loretto*, 458 U.S. at 440; Pet. App. 19.[6]

Second, and even more aggressively, petitioner argues that GTE Northwest has effectively turned over to the State "the exclusive right to direct and control the use and possession of [its] utility property" "in exchange for a monopolistic franchise" -- *i.e.*, that GTE Northwest has bargained away its private property rights in exchange for an exclusive franchise. That assertion is totally false and has no basis in the record in this case. There is absolutely no evidence in the record of any agreement by GTE Northwest to give up its private property rights in its network equipment in exchange for an exclusive franchise. The quid for the quo of the exclusive franchise was GTE Northwest's agreement to provide quality universal telephone *service* to Oregon customers, not to turn over its bundle of private property rights to the State. To the contrary, although evidence was not taken below on this issue, GTE Northwest maintains all the traditional incidents of private ownership of its network property, including title, possession, and the right and obligation to incur debt to finance that property, to depreciate it, and to pay taxes on it. If GTE Northwest dealt away its private ownership of its network property in exchange for an exclusive franchise, that would be news to those with liens on GTE Northwest's property, not to mention to the Internal Revenue Service. In short, there is nothing in the record below, or in reality, to support petitioner's bald assertion that GTE Northwest agreed to give

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[6] *See also Matter of Chicago, Milwaukee, St. Paul and Pacific R.R. Co. v. United States*, 799 F.2d 317, 325 (7th Cir. 1986) (Easterbrook, J.) (rejecting the idea that the "heavily regulated" nature of the railroad industry altered a physical occupation/condemnation takings analysis) ("If Congress condemned a railroad station to serve as a post office, this would be a taking notwithstanding the web of regulation surrounding the railroad, notwithstanding that Congress could have diminished the value of the entire railroad in some other way by an amount equal to the value of the station.").

to Oregon "the exclusive right to direct and control the use and possession of [its] utility property." Pet. 14.

Indeed, petitioner's assertion that GTE Northwest has effectively bargained away the private nature of its network property in exchange for an exclusive franchise is particularly disingenuous in light of the fact that, five days before the petition was filed, the petitioner authorized certain local telecommunications companies to provide local service in direct competition with GTE Northwest. So, even if GTE Northwest had entered into such an exchange (private property turned over to the public in exchange for exclusive franchise), Oregon has breached or rescinded the "deal" and this case no longer presents the argument that petitioner asserts. And, in any event, none of this far-fetched and counterfactual argument is addressed in the decision below or even has a basis in the record below.

Finally, petitioner argues that the decision below is inconsistent with statements made by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), that purportedly support the notion that where the government has the power to forbid a particular use of property without effecting a taking, in exchange for permitting that use, the government may require the owner to tolerate physical occupation of a portion of the property. PUCO argues that because it purportedly could prevent a LEC from placing its own enhanced services equipment on its property, it can condition the LEC's ability to install its own equipment on the LEC's agreement to allow ESPs or other competitors to install their equipment on LEC premises without effecting a taking.

As a predicate matter, it is not clear from the record in this case that PUCO could prevent a LEC from placing its own enhanced services equipment on its property, at lease without some unestablished showing of genuine anticompetitive harm. Indeed PUCO never asserted this purported authority as a basis for the collocation rules. Rather this argument was raised for

the first time in the state's appellate briefs. For this reason alone, it would be imprudent to grant the petition based upon this dubious factual assertion that was not relied upon by the agency that promulgated the rules.

Petitioner also misreads this Court's cases, and the proposition it advances does not apply in this case in any event. In *Dolan*, which was more recently decided, this Court considered whether conditions placed on a property owner's application to expand her store and parking lot -- namely that she dedicate a portion of her land for a public greenway and a pedestrian/bicycle pathway -- constituted a taking. The Court began by specifically observing that "[w]ithout question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." 114 S. Ct. at 2316. That is precisely what PUCO did here -- it simply required GTE Northwest to dedicate a strip of its property to the use of third parties, and just as the Court said in *Dolan*, that is a taking. PUCO did not try to impose collocation as an explicit condition on GTE Northwest's installation of its own equipment, so this case does not even present that issue.

Moreover, in *Yee v. Escondido*, which petitioner ignores on this point, the Court specifically cast doubt on the notion that the State could condition a property owner's own business activities on the property owner's waiver of his right to compensation for a permanent physical invasion. In *Yee*, speaking for the Court, Justice O'Connor specifically observed that "[h]ad the city [in that case] required [a permanent physical] occupation, of course, [the property owners] would have a right to compensation, *and the city might then lack the power to condition [the property owners'] ability to run [their businesses] on their waiver of this right.*" 503 U.S. at 532. This statement in *Yee* merely reiterates what the Court had earlier said in *Loretto* -- that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to

compensation for a physical occupation." *Loretto*, 458 U.S. at 439 n.17. That is precisely what PUCO is suggesting here -- that GTE Northwest's ability to conduct its own business activities can be conditioned on waiving its right to compensation for a physical invasion taking. (After all, if collocation is not a taking, no compensation is required.) The Court has repeatedly rejected that notion.

For all these reasons, the decision below is a perfectly correct application of this Court's well-settled case law concerning takings by permanent physical invasion. There is no reason for this Court to grant review on another application of these well-settled principles to particular factual circumstances.

IV. THE FACTS OF THIS CASE ARE UNIQUE AND THE REASONING OF THE DECISION BELOW WOULD NOT, BY ITS TERMS, PREVENT ANY STATE FROM REQUIRING COLLOCATION.

Petitioner also asserts that the issues presented by the petition are "of substantial and recurring importance." That is not right.

First, the decision below governs only the conduct of Oregon's public utilities commission and does not control the conduct of any other state public utilities authority.

Second, even if the reasoning of the decision were somehow controlling outside of Oregon, petitioner has totally failed to establish that the decision below has any widespread application. Specifically, petitioner is unable to point to any other State in which the relevant public utilities authority (i) has ordered physical collocation and (ii) lacks the power of eminent domain under state law. Both characteristics are necessary for the reasoning of the decision below to apply to

prevent physical collocation, but petitioner cannot point to even one other State in which both characteristics exist.[7]

Third, in neither Oregon nor any other State does the decision below, by its terms, prevent the State from authorizing its public utilities authority to mandate physical collocation. The most that the Oregon Supreme Court decided was that physical collocation constitutes a "taking" within the meaning of the Oregon and the U.S. Constitutions. But neither constitution prevents a State from "taking" private property for a public use; they simply mandate just compensation. GTE Northwest did not need to, and in fact did not, challenge the compensation scheme established by PUCO's Collocation Rules. While GTE Northwest believes that the compensation scheme would not assure just compensation, the Oregon Supreme Court's decision in this case most assuredly does not address that issue. Accordingly, nothing on the face of the opinion prevents even the State of Oregon from authorizing PUCO to order physical collocation on terms that the State believes provides for just compensation.

Finally, nothing in the decision below in any way prohibits PUCO, or any other state public utilities authority, from implementing *virtual* collocation, which GTE Northwest did not challenge.

In short, the notion that the decision below, by its terms, places substantial and widespread limitations on the power of States, or that the rather odd posture of this case is likely to recur with frequency, is simply fanciful.

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[7] Indeed, the only other State that petitioner identifies as being "in the forefront of the collocation issue" -- by which petitioner presumably means the State has a collocation rule in effect -- is New York. Pet. 25 n.15.

V. EVEN IF THIS CASE PRESENTED THE QUESTION OF WHETHER PHYSICAL COLLOCATION EFFECTS A TAKING, THE COURT SHOULD WAIT UNTIL THAT ISSUE HAS BEEN DECIDED BY THE COURTS OF APPEALS CONSTRUING THE COLLOCATION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996.

Section 251(c)(6) of the recently passed Telecommunications Act of 1996 imposes on incumbent LECs "[t]he duty to provide on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier."

The application of these new provisions renders the decision below somewhere between totally insignificant and entirely moot, since at least in the absence of an agreement by the parties to the contrary, the federal collocation requirements mandate largely the same interconnection. Indeed, the Telecommunications Act may render the decision below formally moot, since the Act allows the FCC to preempt any State commission order that is not "consistent with the requirements of th[e] section [where the collocation provisions are found]", § 251(d)(3), and the Oregon Collocation provisions do not appear to be identical with the federal provisions.

These issues add yet another potential complication to the review of this case on the merits, which counsels strongly against granting the petition.

Finally, even if the Court believes that the issue of whether physical collocation effects a taking is certworthy, it should, at a minimum, wait to consider that issue until the federal courts of appeal have had the opportunity to address takings challenges, if any, to the physical collocation requirements in the new Telecommunications Act of 1996.

CONCLUSION

For all the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

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